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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for the State of Oklahoma,
Respondent.

REPLY BRIEF

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ARGUMENT

The brief in response to the petition for writ of certiorari filed herein does not meet the single issue presented by the petitioner. For this reason a reply brief is deemed necessary to prevent diversion of the Court's attention.

Respondent's brief reprints the question involved and indicates at page five thereof that the question is "appar-

ently limited" to the validity of the 1941 amendatory act rather than to the amended Sections 10478-9, Oklahoma Statutes 1931. The question is not only apparently so limited, but is actually and absolutely limited; petitioner has no intention of presenting either an hypothetical situation nor abstract questions of law.

It is insisted that a decision herein would apply only to the instant case since but two life insurance companies have challenged the application of the 4 per cent tax, but these challenges are test cases which do not, of themselves, prevent actions by other foreign insurance companies doing business in Oklahoma. Petitioner is not asking the Court to decide as to premium taxes collected subsequent to the premium tax involved herein, but instead requests a ruling on the situation actually and presently existing. Therefore, petitioner respectfully directs the attention of the Court to the actual question presented in its brief as distinguished from what the respondent calls "the basic proposition actually involved" at page six of the brief in response. The meat of the question is whether petitioner may be taxed upon a privilege already granted.

The Lincoln Life Insurance Case

In support of the contention that the decision of the District Court for Oklahoma County, Oklahoma, in the case of *Lincoln Life Insurance Company* v. *Jess G. Read,* is binding upon this Court, petitioner cites *Fidelity Union Trust*

Company et al. v. *Field*, 311 U. S. 169, 85 L. ed. 109, 61 S. Ct. 176, based upon decisions of the Court of Chancery of the State of New Jersey. It will be observed that the cited case was predicated upon final Court of Chancery decisions which had not been reviewed by appellate New Jersey courts and were, therefore, complete and final adjudications. The Lincoln Life Insurance Company case is now being appealed and is not final. It was only a ruling upon a demurrer and there was no stipulation of facts or trial. The record discloses (R. 39) that the journal entry of judgment was prepared by counsel for respondent in this case.

This journal entry of judgment, in holding that the gross premiums tax was paid for the privilege of *having been* permitted to do business in Oklahoma during the *expiring* license year, correctly states the fact that the insurance commissioner required a showing of past compliance with the gross premiums tax law before he would renew the annual license, but does not determine that said 4 per cent tax was a legally valid condition precedent to doing business during the *ensuing* license year. Thus the District Court of Oklahoma County did not rule upon the question of law presented to this Court.

Petitioner admits that respondent required it to show that it had paid the 1941 4 per cent gross premiums tax before he would renew petitioner's license for 1942. The issue now is whether respondent had the constitutional right to require this showing of past compliance with the 1941 act

challenged herein. It is imperative that it be determined whether the 4 per cent tax was imposed as a condition precedent to the 1941 license year in view of the fact that before the additional tax was imposed the state had already authorized the transaction of business during that license year. If said tax was not a condition precedent to this license year, then the respondent had no constitutional right to require a showing that petitioner had complied with the law before renewal of the 1942 license.

In this connection, petitioner is acceding to the argument of counsel that foreign insurance companies are "within the State of Oklahoma" only from year to year; but this is merely an admission *arguendo* for the purpose of narrowing the issue. Thus, even if petitioner be considered as within the state only for the license year commencing March 1, 1941, the additional tax burden was imposed after petitioner's admission for that year, and was neither in fact nor in law a condition precedent to said business period.

No decision of a state court, whether final or not, is regarded as the rule of decision in the courts of the United States where the question involves the Constitution of the United States. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

The Gross Premiums Tax Was Not a Condition Precedent to the 1941 License Year

Respondent's reference to the case of *Pacific Mutual Life Insurance Company* v. *Hobbs* (Kansas 1940), 103 Pac. (2d) 854, confirms the fact that the tax paid in the present case was paid for the privilege enjoyed in 1941, and that the payment followed exercise of the privilege. It will be seen at page thirteen of the brief in response that plaintiff company in the Kansas case adopted the theory that the taxes were "paid for the privilege of doing business in Kansas during the *ensuing* year." This likewise appears to be the theory advanced by the respondent herein. The Kansas opinion correctly held that the tax was not a prospective privilege tax, but was paid for the preceding year, and that to hold otherwise would permit a foreign company coming into the state for the first time to "be exempt from taxation on the business done in the first year, if it withdrew at the end of the first year."

In this Court's opinion in the case of *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179, a principal turning point was whether the net receipts tax was a condition precedent to the right to do business during the year in which the tax was collected. Said tax was designated as Section 30. This Court said:

> "What, therefore, we have to decide here is whether the application of Section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade

and commerce for which the company paid 2 per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

"It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois * * *."

Respondent asserts that this Court determined that the Illinois gross premiums tax mentioned in the Hanover decision was a constitutional tax. The constitutionality of said tax was not involved nor challenged. It was not an issue in the case, other than as an assumed condition precedent. Had it been the tax questioned, an examination of the Illinois gross premiums taxing act will disclose that said act is entirely dissimilar to the Oklahoma 1941 act and that in its application the gross premiums tax is actually paid for the ensuing license year. See Cahill's Illinois Revised Statutes 1925, c. 73, Sec. 79. Section fourteen of the Illinois laws of the Fifty-first General Assembly (1919) clearly shows that as to corporations qualified to do business in Illinois prior to the time of the passage of the act the gross premiums tax was paid for the privilege of doing an insurance business in the state for the ensuing year and that it was paid in advance of the issuance of the license. The same form of taxing act was involved in the case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108, considered at page twenty of the brief in response. The petitioner concedes that it may be quite possible for a gross premiums tax to be applied as a condition precedent, and,

therefore, to be constitutional under the Fourteenth Amendment, but believes that the 1941 Oklahoma act was not a condition precedent to the 1941 license year, either in law or in fact. As said by Chief Justice Taft in the *Hanover* case, *supra*:

> "* * * but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (page 509).

At page 27 of the response brief, referring to the Hanover case, it is said that this Court held "in effect" that so long as the net receipts tax was computed upon the debased value, as was other personal property, it was not discriminatory or invalid. This was neither the substance nor the effect of the holding. See *Concordia Fire Insurance Company* v. *People of State of Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830, at which time the Illinois Supreme Court had ruled that the net receipts tax was, after all, a tax on personal property, and was thus a constitutional imposition. In the *Concordia* case, this Court held that the tax was still discriminatory and invalid, and subject to the same objections mentioned in the Hanover case whether treated as an excise tax or a property tax. This Court ruled that the plaintiff had not sustained its burden of proving either that competing domestic companies did not pay other taxes from which foreign companies were exempt or that the tax burden was not otherwise equalized. It was this decision which led to stipulation of fact No. 2 herein (R. 22-27) in which it is

agreed that domestic companies pay no taxes not likewise paid by plaintiff, except an annual income tax, the amount of which approximates 1/20th of the amount which a 4 per cent tax would bring if placed on the premiums collected by domestic companies.

Petitioner likewise disagrees with the contention, stated at page 28 of the response brief, that in the Hanover case this Court "in effect" held that while the net receipts tax was a "privilege tax," same was not paid "for the license or privilege to do business in the state." The Supreme Court of Illinois had ruled that the net receipts tax was a new and additional privilege tax. *Hanover* v. *Carr*, 317 Ill. 366, 148 N. E. 23. What this Court actually held is best expressed in the words of the author of the opinion:

> "It is true that the interpretation put upon such a tax law of a state by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal constitution."

In like manner, the Oklahoma Supreme Court has said that the 2 per cent gross premiums tax law was a "privilege tax." *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936. This Court can determine whether, admitting that the 4 per cent gross premiums tax law is a "privilege tax," the same was a valid condition precedent to the yearly period of business enjoyed by this petitioner and commencing on March

1, 1941. Certain parts of the New York Life Insurance Company case are quoted in the response brief. The quotations do not disclose that the Oklahoma Supreme Court recognized that limitations upon a state's powers toward foreign insurance companies are imposed by the Constitution of the United States. The Oklahoma Court was not determining the constitutionality of the old premiums tax act. It was deciding that it was an excise tax, so that the provision in the statute that such tax should be "in lieu of all other taxes or fees" was found to mean "in lieu of all other (*Excise*) taxes."

Petitioner admits that the tax herein is an excise tax. It does not admit that it was a condition precedent to petitioner's right to do business in 1941, since it was not paid until the expiration of said license year, and was not imposed until after petitioner had complied with all conditions prerequisite to the issuance of a license for that year. It would seem impossible for a state to grant a privilege, then, six weeks later, to levy an additional and grossly discriminatory charge (which makes no effort to be prospective) for the same privilege.

The Shaffer Oil and Refining Company Case

Respondent seeks to distinguish *Sneed, Treasurer,* v. *Shaffer Oil and Refining Company et al.,* 35 Fed. (2d) 21, on the ground that foreign corporations other than insurance companies receive no annual license from the Oklahoma

Insurance Commissioner, but instead receive a twenty-year license from the Secretary of State. The Circuit Court of Appeals' opinion points out that every such foreign corporation doing business in this state must "procure annually from the corporation commission a license authorizing the transaction of such business in this state." The license fee paid therefor was disproportionate to the amount required of domestic corporations. One of the penalties for failure to obtain this *annual* license was ouster of the foreign corporation from the state. It was this annual privilege tax which the then Eighth Circuit Court of Appeals held to be unconstitutional, following the doctrine of the Hanover case. Obviously a twenty-year license gave foreign corporations no more tenure in the state than an annual license gives to foreign insurance companies.

Gross Premiums Tax Laws of Other States

The brief in response reprints portions of a "Taxation Mannal" at page 19. While this manual is not a part of the record of this case it is helpful in conveniently showing to the Court the heavy discrimination existing under the Oklahoma tax laws as compared with the somewhat similar laws of other states. Apparently the laws of other states have a general tax inequality on premiums of from 1½% to 2%. The inequality in Oklahoma is 4%. The manual does not disclose whether or not substantial equality may have been achieved in the listed states by the imposition of other

and different taxes upon domestic insurance companies, from which taxes foreign companies are exempt. It is also possible that in some of those states, as in Illinois and in New York, the premiums taxes are actually valid conditions precedent to the right to do business during an ensuing license year. If so, they would represent a constitutional exercise of the state's police power.

But none of the statutes of other states, and none of the proportionate tax burdens of other states are on trial here. The 1941 Oklahoma act is by far the most discriminatory act in the United States. The "Taxation Manual" serves to emphasize the importance of the question herein involved and further justifies the issuance of a writ of certiorari by this Court.

A Person Enforcing an Unconstitutional State Statute Does Not Represent the State

One who is enforcing or is attempting to enforce an unconstitutional state statute, is stripped of his official character and is not possessed of immunity from suit under the Eleventh Amendment. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 715 at 729, 28 S. Ct. 441; *Ex parte La Prade*, 289 U. S. 444, 77 L. ed. 1311, 53 S. Ct. 682.

Where a state officer has collected money under an unconstitutional statute and still has possession of such money, he is subject to a suit to reclaim the amount. This is doubly true where a state statute contemplates the course taken by

the plaintiff and provides against any difficulty in which the state officer might find himself. *A. T. & S. F. Railway Company* v. *O'Connor*, 223 U. S. 279, 56 L. ed. 436, 32 S. Ct. 216. The brief in response attempts to distinguish this opinion upon the ground that O'Connor was not sued in a representative capacity, but was sued individually. If such had been the case, this Court would have had no occasion to mention the state statute providing for a refund of taxes erroneously paid to the secretary of state.

Petitioner herein brought this action against "Jess G. Read, Insurance Commissioner," not against "Jess G. Read, *as* Insurance Commissioner." It is inconceivable to petitioner that this Court, or any court, would base the right of constitutional protection upon a descriptive designation affixed to the defendant by the plaintiff taxpayer. The descriptive phrase does not alter the unofficial character of respondent's action.

If a state statute is unconstitutional, the person injured thereby is entitled to relief from the action taken or about to be taken under color thereof. *Monamotor Oil Co.* v. *Johnson, State Treas.*, 3 Fed. Supp. 189; *Porter* v. *Beha, Supt. of Ins.*, 12 Fed. (2d) 977; *Roadway Express* v. *Murray et al.*, 65 Fed. (2d) 293; *Southern Pac. Co.* v. *Conway*, 115 Fed. (2d) 746.

The gravamen of all opinions, both prior and subsequent to the Eleventh Amendment has been, first, a determination as to whether the money sought has been placed in

the general treasury and co-mingled with the state's funds and, second, whether the state has consented to the suit. Both objections are eliminated herein. See stipulation of fact No. 1 (R. 22-27) that the sum paid by petitioner "has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma." The second objection is eliminated by Section 12665, Oklahoma Statutes 1931.

CONCLUSION

Petitioner respectfully requests issuance of the writ.

Respectfully submitted,

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